Tirumeniyar a/l Singara Veloo v Malaysian Motor Insurance Pool

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-1717–09 OF 2016
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
14 APRIL 2017

Insurance — Motor insurance — Liability — Plaintiff prayed for declaration that insurance policy issued by plaintiff to second defendant invalid and unenforceable — Whether insurance policy covered negligence of authorised driver — Whether integrity of decision-making process compromised – Road Transport Act 1987 ss 2, 91(aa), (bb) & 96

Malaysian Motor Insurance Pool ('the plaintiff') was the insurer of the motor lorry owned by Shakti Velan Enterprise ('the second defendant'). The facts of the case were that, while the first defendant was reversing the lorry, the third defendant who was the lorry attendant knocked down and sustained injuries. The adjuster's report confirmed that the third defendant was the employee of the second defendant. Consequently, the plaintiff contended that it was not liable under the Road Transport Act 1987 ('the Act'). The trial judge had allowed part of plaintiff's claim in prayer 1 and ruled that the insurance policy ('the policy') of the second defendant issued by the plaintiff was set aside and of no effect pursuant to s 96(3) of the Act. One of the reasons that the learned trial judge took into consideration was that the third defendant did not depose an affidavit in response to the plaintiff's application. The learned judge had also considered the provisions of s 91(1)(aa) and (bb) of the Act, cl II of the policy, exception to cl II of the policy and s 2 of the Act; and found that the plaintiff by virtue of s 96 was entitled to avoid liability to the third defendant. This was an appeal by the third defendant against the decision of the trial court.

Held, allowing the appeal with costs of RM5,000 subject to allocator and setting aside the order of the High Court:

(1) In the present case, the originating summons was related to declaratory relief. Declaratory reliefs were discretionary in nature and the burden was on the plaintiff to adduce evidence as well as submit on the law to entitle the court to grant the order. Even if the defendant did not file an opposing affidavit, that did not mean the court could give a declaratory order by default. The learned trial judge on the facts of the case fell into grave error in taking into consideration the failure of the third defendant to depose the affidavit in person. Consequently, the integrity of the decision-making process had been compromised (see para 11).

(2) In the present case, the purported tortfeasor was the first defendant who was the authorised driver of the second defendant. Under the general law of negligence, the first defendant would be liable to the third defendant if he was found liable. The policy terms specifically stated that it would indemnify the authorised driver. Thus, not only the policy covered the relationship between the second defendant and the insurer but over and above, it extended the coverage also to an authorised driver. However, the Act by itself did not prohibit the third defendant suing the first and second defendants under the common law. What the Act did was that, it restricted the scope of insurer's liability in respect of the mandatory policy. However, if the insurer wanted to give extended cover such as to cover the negligence of the first defendant, there was no prohibition under the Act. The learned judge fell into grave error of law when she construed s 91(1)(aa) of the Act in a manner to favour the plaintiff when the plaintiff's policy terms covered negligence of the first defendant which had nothing to do with the statutory mandatory coverage. Based on the above findings, this was not a fit and proper case to allow the declaratory prayer (see paras 15, 17 & 20).

[Bahasa Malaysia summary

Malaysian Motor Insurance Pool ('plaintif') adalah syarikat insurans lori yang dimiliki oleh Shakti Velan Enterprise ('defendan kedua'). Fakta kes adalah, pada masa defendan pertama mengundur lori, defendan ketiga yang merupakan kelindan lori telah dilanggar dan mengalami kecederaan. Laporan adjuster mengesahkan bahawa defendan ketiga adalah pekerja defendan kedua. Berikutan itu, plaintif berhujah bahawa ia tidak bertanggungjawab di bawah Akta Pengangkutan Jalan Raya 1987 ('Akta tersebut'). Hakim perbicaraan telah membenarkan sebahagian tuntutan plaintif dalam permohonan 1 dan memutuskan bahawa polisi insurans ('polisi tersebut') defendan kedua yang dikeluarkan oleh plaintif diketepikan dan tidak mempunyai kesan menurut s 96(3) Akta tersebut. Salah satu sebab yang hakim perbicaraan yang bijaksana mempertimbangkan adalah bahawa defendan ketiga tidak mendeposkan afidavit menjawab permohonan plaintif. Hakim yang bijaksana juga mempertimbangkan peruntukan s 91(1)(aa) dan (bb) Akta tersebut, fasal II polisi tersebut, pengecualian kepada fasal II polisi tersebut dan s 2 Akta tersebut; dan mendapati bahawa plaintif menurut s 96 berhak mengelak liabiliti terhadap defendan ketiga. Ini adalah rayuan oleh defendan ketiga terhadap keputusan mahkamah perbicaraan.

Diputuskan, membenarkan rayuan dengan kos RM5,000 tertakluk kepada alokatur dan mengenepikan perintah Mahkamah Tinggi:

(1) Dalam kes ini, saman pemula adalah berkaitan relif deklaratori. Relif-relif deklaratori bersifat mengikut budi bicara dan beban terletak atas plaintif untuk mengemukakan keterangan dan juga berhujah

berdasarkan undang-undan untuk memberi hak mahkamah memberikan perintah itu. Jikapun defendan tidak memfailkan afidavit bantahan, itu tidak bermaksud mahkamah boleh memberikan perintah deklaratori secara terus. Hakim perbicaraan yang bijaksana berdasarkan fakta kes telah terkhilaf kerana telah mempertimbangkan kegagalan defendan ketiga untuk mendeposkan afidavit secara peribadi. Akhirnya, integriti proses membuat keputusan telah dikompromi (lihat perenggan 11).

(2) Dalam kes ini, pelaku tort yang dikatakan adalah defendan pertama yang merupakan pemandu yang dibenarkan defendan kedua. Di bawah undang-undang am kecuaian, defendan pertama bertanggungjawab kepada defendan ketiga jika dia didapati bertanggungjawab. Terma-terma polisi menyatakan secara spesifik bahawa ia akan menanggung rugi pemandu yang dibenarkan. Oleh itu, bukan sahaja polisi tersebut melindungi hubungan antara defendan kedua dan penanggung insurans tetapi lebih daripada itu, ia meluaskan perlindungan tersebut juga kepada pemandu yang dibenarkan. Walau bagaimanapun, Akta terebut dengan sendiri tidak melarang defendan ketiga daripada menyaman defendan-defendan pertama dan kedua di bawah undang-undang am. Apa yang Akta tersebut lakukan adalah, ia mengehadkan skop liabiliti penanggung insurans berkaitan polisi mandatori tersebut. Namun begitu, jika penanggung insurans ingin memberikan perlindungan lebih luas seperti melindungi kecuaian defendan pertama, tiada larangan di bawah Akta tersebut. Hakim yang bijaksana telah terkhilaf dari segi undang-undang apabila beliau mentafir s 91(1)(aa) Akta tersebut yang mana menyebelahi plaintif walhal terma-terma polisi plaintif melindungi kecuaian defendan pertama yang tiada kaitan dengan perlindungan mandatori statutori itu. Berdasarkan dapatan di atas, kes ini tidak layak dan sesuai untuk membenarkan permohonan deklaratori (lihat perenggan 15, 17 & 20).]

Notes

For cases on liability, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 443–451.

Cases referred to

Awalluddin bin Sham Bokhari v Public Prosecutor [2017] 5 MLJ 673; [2016] 2 AMR 20, CA (refd)

CKH Engineering Sdn Bhd v Lim Beng Kit [2017] MLJU 280, FC (refd)

Lim Eng Yew v United Oriental Assurance Sdn Bhd [1989] 1 MLJ 454; [1989] 2 CLJ Rep 65, HC (refd)

Malayan Banking Berhad v Chatere Field Corporation Sdn Bhd [2001] 3 MLJ 160; [2001] 3 AMR 3686, HC (refd)

A *Malaysian Motor Insurance Pool v Gopalan a/l Katan & Ors* [2016] MLJU 894; [2016] 1 LNS 981, HC (refd)
Manap bin Mat v General Accident Fire & Life Assurance Corporation Ltd [1971] 1 MLJ 134, CA (refd)
Saw Poh Wah v Ooi Kean Hang & Anor (Asia Insurance Co Ltd as third party)
B [1985] 2 MLJ 387 (refd)

Legislation referred to

Road Transport Act 1987 ss 2, 91(1), (1)(aa), (1)(bb), 96, 96(3)
Rules of Court 2012 O 13, O 19, O 28 r 3C, O 41 r 5, 5(1), (2)
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Appeal from: Originating Summons No WA-24 NCVC–248/2 of 2016 (High Court, Kuala Lumpur)

V Manoharan (Manoveera & Co) for the appellant.
D *Suresh Andrew (Shan & Su) for the respondent.*

Hamid Sultan JCA (delivering judgment of the court):

E **[1]** The appellant/third defendant (victim of an accident) appeal is against the decision of the learned High Court judge who had ruled that the insurance policy (issued by Malaysian Motor Insurance Pool) of the second defendant (purchaser of the policy) issued by the respondent/insurance company/plaintiff is set aside and of no effect pursuant to s 96(3) of the Road
F Transport Act 1987 ('the RTA 1987'). The said prayer sought by the respondent in the High Court reads as follows:

> 1. Deklarasi bahawa Polisi Insuran yang dikeluarkan oleh Pihak Plaintif dengan nombor 235-012-15-000846 terhadap Pihak Defendan Kedua diisytiharkan dibatalkan dan tidak berkuatkuasa dan Plaintif berhak
G untuk mengelakkan tanggungan bersangkutan sebarang tuntutan yang timbul daripada kemalangan jalanraya yang dikatakan berlaku 25.3.2015 di sebatang lorong yang tidak dinamakan di belakang Jalan Teratai 1, Bandar Amanjaya, Sungai Petani, Kedah yang melibatkan Defendan Ketiga dan m/lori No: ACN6836 yang di miliki oleh Pihak Defendan
H Kedua dan dipandu oleh Pihak Defendan Pertama.
>
> 2. Gantirugi Am;
>
> ...

I **[2]** The learned trial judge had written an articulate judgment setting out the law and facts in great detail without considering:

(a) the RTA 1987, inter alia, is meant to cover third party claims which is often referred to mandatory statutory coverage;

(b) policy terms may include coverage for common law liability of the policy holder with mandatory statutory coverage; and

(c) the policy terms in the instant case contains statutory coverage and also limited coverage in respect of common law liability.

[3] The facts of the case also have become convoluted for various reasons which we do not propose to deal with in detail. In this judgment we are just going to deal with the law based on the primary facts whether the respondent is entitled to the declaratory prayer sought. This judgment must be read together with the judgment of the learned trial judge reported as *Malaysian Motor Insurance Pool v Gopalan a/l Katan & Ors* [2016] MLJU 894; [2016] 1 LNS 981 to appreciate our grounds in the proper perspective.

BRIEF FACTS

[4] The plaintiff is the insurer of the motor lorry owned by the second defendant who is the purchaser of the insurance policy.

[5] The first defendant is the driver of the motor lorry who in an accident caused injury to the third defendant.

[6] The third defendant was a lorry attendant in the said lorry. While the first defendant was reversing the lorry it is alleged that the third defendant was knocked down and sustained injuries.

[7] The adjuster's report confirms that the third defendant was the employee of the second defendant. As a result, the plaintiff had argued that it is not liable under RTA 1987. That part of the judgment reads as follows:

> 7. Based on such investigation, the Plaintiff alleged that, as the insurer of the second defendant's lorry, the plaintiff is not liable under the RTA to pay any general damages and/or special damages pursuant to the third defendant's claim.
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> 8. The plaintiff therefore applied for a declaration that the scope of the policy issued by the plaintiff does not cover the incident as asserted by the third defendant on the ground that the third defendant falls within the exception provided by the law where the plaintiff, as the insurer, is entitled to avoid liability under the policy and has no obligation to pay the third defendant's claim since the third defendant is an employee of the second defendant.

[8] The third defendant in abundance of caution had anchored his argument based on the premise that he was a passenger of the lorry at the time when he was carrying out his duties as a lorry attendant. The issue here is whether he is an employee of the second defendant and if so whether the insurers will be liable for the negligent act of the first defendant based on the

policy terms and not the RTA. The difficulty in the judgment of learned trial judge is that she had read both the Act and policy terms as one, giving priority to the Act per se.

[9] The court had only allowed part of the prayer (1) and dismissed prayers (2) and (3). The prayer allowed in item (1) reads as follows:

> Deklarasi bahawa Polisi Insurans yang dikeluarkan oleh Pihak Plaintif dengan nombor 235-012-15-000846 terhadap Pihak Defendan Kedua diisytiharkan dibatal dan tidak berkuatkuasa

SIDE ISSUE

[10] One of the reasons that the learned judge took into consideration was that the third defendant did not depose an affidavit in response to the plaintiff's application. The affidavit in reply was filed by the third defendant's solicitor. Notwithstanding that the plaintiff did not take issue the learned judge took issue based on O 28 r 3C of the Rules of Court 2012 as well as O 41 r 5(1) and (2) which read as follows:

> 3C Supporting affidavits (O 28 r 3C)
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> (1) Unless otherwise provided in any written law, where the plaintiff intends to adduce evidence in support of an originating summons, he shall do so by affidavit and shall file the affidavit or affidavits and serve a copy thereof on every defendant not later than seven days after the service of the originating summons.
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> (2) Unless otherwise provided in any written law, in the case of an ex parte originating summons, the applicant shall file a supporting affidavit or affidavits at the time of filing the originating summons.
>
> (3) Where the defendant intends to adduce evidence with reference to the originating summons served on him, he shall also do so by affidavit and the affidavit or affidavits shall be filed and a copy thereof shall be served on the plaintiff not later than twenty- one days after being served with a copy of the affidavit or affidavits by the plaintiff under paragraph (1).
>
> (4) Unless otherwise directed by the Court, a party intending to reply to an affidavit served on him shall file his affidavit and serve it on the other party within fourteen days from the date the affidavit he intends to reply was served on him.
>
> 5 Contents of affidavit (O 41 r 5)
>
> (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof.

[11] We do not think the learned judge had stated the correct principles of law on affidavits (see *Janab's Key to Civil Procedure* (5th Ed) — pp 329–336). It is well settled that a supporting affidavit in an originating summons must be filed by the plaintiff or his power of attorney or any person who is entitled by law to do so. Order 28 r 3C by itself does not impose the same restriction in respect of affidavit in reply by the defendant. However, the affidavit in reply if filed by any other authorised person of the defendant who does not have personal knowledge may not have probative force as per O 41 r 5 (see *Awalluddin bin Sham Bokhari v Public Prosecutor* [2017] 5 MLJ 673; [2016] 2 AMR 20). In *Malayan Banking Berhad v Chatere Field Corporation Sdn Bhd* [2001] 3 MLJ 160; [2001] 3 AMR 3686, the point of debate was whether a solicitor may depose an affidavit on behalf of a litigant. Ramly Ali JC (as he then was) took the view that:

> (a) There are no express provisions of law relating to this matter, nor is there any provision of law which specifically states that an affidavit such as that in the instant case cannot be accepted by the court;
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> (b) On the authorities, a solicitor may depose an affidavit on behalf of the litigant, provided the following conditions are fulfilled, ie:
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> (i) The facts to be deposed must not be contentious or disputed questions of fact;
>
> (ii) The facts to be deposed must be from his knowledge; and
>
> (iii) The solicitor must have been authorised by the litigant, to depose the affidavit on his behalf.'

[12] What is also important to note in this case is that the originating summons relates to declaratory relief. Declaratory reliefs are discretionary in nature and the burden is on the plaintiff to adduce evidence as well as submit on the law to entitle the court to grant the order. Even if the defendant does not file an opposing affidavit that does not mean the court can give a declaratory order by default (see O 13 and O 19 of the RC 2012; *CKH Engineering Sdn Bhd v Lim Beng Kit* [2017] MLJU 280. The learned trial judge on the facts of the case fell into grave error in taking into consideration the failure of the third defendant to depose the affidavit in person. In consequence, the integrity of the decision making process had been compromised.

MAIN ISSUE

[13] The learned trial judge had considered the provisions of: (i) s 91(1) proviso (aa) and proviso (bb) of the RTA; (ii) cl II of the policy (we prefer to refer it as clause and not as section as stated in the policy); (iii) exception to cl II of the policy; (iv) s 2 of the RTA 1987; (v) s 96; and had come to the conclusion that the plaintiff by virtue of s 96 is entitled to avoid liability to the third defendant. To save judicial time, we repeat verbatim, inter alia, that part of the

judgment which reads as follows:

(2) Whether, based on the exceptions in s 91(aa) and (bb) of the RTA, and the exceptions to section II of the Policy, the Plaintiff, as the insurer for the lorry, has to pay the 3rd Defendant's claim pursuant to the accident on 25.3.2015

20. S 91(1) of the RTA, in particular, the proviso in (aa) provide as follows:

91 Requirements in respect of policies

(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —

(a) is issued by a person who is an authorised insurer within the meaning of this Part; and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

Provided that such policy shall not be required to cover —

(aa) *liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment*: or

(bb) *except in the case of a motor vehicle in which passengers are carried* for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or (Emphasis added.)

21. Section II of the Policy provides as follows:

SECTION II — LIABILITY TO THIRD PARTIES

1. *The Pool will* subject to the Limits of Liability *indemnify the Insured* in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay *in respect of*

(a) *death of or bodily injury to any person*

(b) damage to property

2. In terms of and subject to the limitations of and for the purposes of this Section the Pool will *indemnify any Authorised Driver who is driving the Motor Vehicle* provided that such Authorised Driver

(i) shall as though he were the Insured observe fulfil and be subject to the Terms of this Policy insofar as they can apply;

(ii) is not entitled to indemnity under any other policy. (Emphasis added.)

22. The Policy also provides for the exceptions to Section II as follows:

EXCEPTIONS TO SECTION II

The Pool shall not be liable in respect of

(i) death bodily injury or damage caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to the Motor Vehicle for loading thereon or the taking away of the load from the Motor Vehicle after unloading therefrom;

(ii) death of or *bodily injury to any person in the employment of the Insured arising out of and in the course of such employment;*

(iii) death of or bodily injury to any person *(other than a passenger carried* by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises. (Emphasis added.)

23. It is observed that Section II, and exception (ii) to Section II of the Policy are consistent with the exception in s 91(1) proviso (aa) of the RTA. If it is proved that the third defendant is an employee of the insured/second defendant in the course of such employment, then the Plaintiff is not liable to pay for the third defendant's injury.

24. Applying s 91(1)(aa) to the present case, the plaintiff, as the insurer, is not required under the policy to cover any liability in respect of bodily injury sustained by the third defendant arising out of and in the course of his employment.

25. The third defendant contends that he does not fall within the exception to Section II of the policy which excludes the pool/insurer from liability if there is bodily injury to any person (ie the third defendant) in the employment of the insured/second defendant in the accident arising out of and in the course of such employment.

26. The third defendant further contends that he is not an employee of the authorised driver. Hence, the third defendant does not fall within proviso (aa) to s 91(1) of the RTA. Instead, the third defendant is a mere 'passenger' and falls within proviso (bb) to s 91(1) of the same Act. Therefore, the plaintiff is liable for the third defendant's bodily injury arising out of the use of the motor vehicle or lorry as a passenger.

27. In s 2 of the RTA, the definition of 'passenger' reads as follows:

'passenger' —

(a) in relation to a person carried on a public service vehicle, does not include the driver or conductor or any ticket inspector on the vehicle in pursuance of his duties;

(b) *in relation to persons carried on a goods vehicle, does not include the driver or any attendant required by law to be carried on such vehicle*; and

(c) in relation to a private car, does not include the driver. (Emphasis added.)

28. It is clear that under paragraph (b) of the above definition, 'passenger' does not include a driver or any attendant.

29. Notwithstanding the third defendant's contentions, however, the plaintiff's documentary evidence as adduced through the adjuster's report (exh GKP3) show that the third defendant is not a passenger, but is an employee, as follows:

(1) from the second defendant's SOCSO contributions for D3, it is clear that the third defendant is the second defendant's employee;

(2) the third defendant's salary slips, as an employee, were issued by the second defendant, as the employer;

(3) the third defendant's own admission to the plaintiff's adjuster that he is the second defendant's employee.

30. Furthermore, in the third defendant's Suit 181, he pleaded that he is a lorry attendant.

31. Therefore, it can be safely concluded that the third defendant is the second defendant's employee, and not a mere passenger. The third defendant therefore falls within the exception in proviso (aa) to s 91(1) of the RTA.

32. In *Saw Poh Wah v Ooi Kean Heng & Anor (Asia Insurance Co Ltd As Third Party)* [1985] 2 MLJ 387 the plaintiff claimed against the defendants for negligence of the first defendant as the servant or agent of the second defendant in driving a motor-lorry. The plaintiff was at all material times employed by the second defendant, the registered owner of the vehicle, as an attendant. The first defendant was employed by the same as driver. By consent the plaintiff obtained judgment against the defendants for the sum of $65,000/- in damages together with interest and costs to be taxed. The defendants filed a claim against the third party, the insurers of the lorry, for whatever damages and costs which the defendants may be called upon to pay the plaintiff.

The said motor lorry had a 'C' Carrier licence and was insured with Third Party Risks. Section II of the insurance policy dealt with 'Liability to Third Parties'. The issue before the court depended on the true construction of Section II and the exceptions (ii) and (iii) of the policy.

33. The High Court held as follows:

(1) the liability of the driver, the first defendant, to the injured employee, the plaintiff, was covered by the insurance policy by virtue of Section II para 2;

(2) the third party should therefore indemnify the defendants on the judgment entered for the plaintiff and pay the costs of third party proceeding to the defendants.

34. Upon appeal by the third party/insurers, the Federal Court allowed the appeal of the insurer, without delivering a written judgment. The Federal Court held that there was no cross-appeal by the respondents against the trial judges' finding that the plaintiff (the lorry attendant) was not a passenger. As such the learned trial judge should have held that the exceptions to Section II of the policy applied. Hence, the insurer was not liable to indemnify the defendants (see editorial note to *Saw Poh Wah*).

35. In view of the adjuster's findings and report that the third defendant is an employee of the second defendant, and the third defendant's own admission to the adjuster that he is an employee of the second defendant, and fortified by the fact that the plaintiff's own statement of claim in Suit 181 asserts that he is a lorry attendant, I am satisfied that the plaintiff has proved, on a balance of probabilities, that the third defendant is an employee of the second defendant.

36. Applying the principles in *Saw Poh Wah* as laid down by the Federal Court, I adopt the view that the third defendant, being a lorry attendant, is not a passenger. Thus, the exception in para (ii) to Section II of the policy should apply. This means that the plaintiff, as the insurer, is not liable in respect of the bodily injury to the third defendant in the employment of the insured, ie the second defendant, arising out of and in the course of such employment.

37. Similarly, the exception in proviso (aa) to s 91(1) of the RTA should apply here.

38. Therefore, the plaintiff, being the insurer, is entitled to avoid liability to the third defendant. This is provided for under s 96 of the RTA, in particular s 96(3) as follows:

> *96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks*
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, *judgment* in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) *is given against any person insured by the policy, then* notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, *the insurer shall*, subject to this section, *pay to the persons entitled to the benefit of the judgement any sum payable* thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.
>
> (2) No sum shall be payable by an insurer under subsection (1) —
>
> (a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings; ...
>
> (3) *No sum* shall be *payable by an insurer* under subsection (1) *if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable*:

> *Provided* that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become *entitled* to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action *unless*, before or within seven days after the commencement of that action, *he has given notice thereof to the person who is the plaintiff in the said proceedings* specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (Emphasis added.)

[14] The memorandum of appeal of the appellant, inter alia, reads as follows:

1. Hakim Mahkamah Tinggi khilaf apabila gagal/ enggan sama sekali merujuk kepada otoriti *MAHKAMAH AGUNG* dan *MAHKAMAH RAYUAN,* yang mengikat beliau, iaitu *United Oriental Assurance Sdn Bhd v Lim Keng Yew* [1991] 3 MLJ 429, dan *Union Insurance (M) Sdn Bhd v Chan You Young* [1999] 1 MLJ 593; [1999] 3 CLJ 517 dan *The People's Insurance Co (M) Bhd v Ting Tiew Kiong* [2007] 5 MLJ 624; [2007] 5 CLJ 225 yang telah memutuskan atas isu perlindungan Polisi sama seperti yang dibangkitkan dalam kes ini, dan dimana telah diputuskan bahawa Polisi insurans yang terma yang sama harus melindungi pihak yang cedera semasa dalam urusan kerja.

2. Hakim Mahkamah Tinggi gagal mengendahkan interpretasi kepada perkataan di *Exception to Section II* dalam Polisi Responden yang berbunyi '*The Pool shall not be liable in respect of: … (ii) Death or bodily injury to any person 'in the employment of the Insured'* … yang telah diputuskan oleh kes Mahkamah Agung *United Oriental Assurance v Lim Eng Yew* sebagai *terhad kepada situasi* di mana pihak tercedera sedang menumpang kenderaan yang dipandu oleh majikan/pihak dilindungi (Insured) sahaja *DAN BUKAN* dalam kes dimana kenderaan dipandu oleh pekerja kepada pihak dilindungi (seperti kes ini).

3. Hakim Mahkamah Tinggi gagal mengendahkan interpretasi yang betul kepada *Exception to Section II* dalam Polisi Responden yang berbunyi '*The Pool shall not be liable in respect of…* (iii) *Death or bodily injury to any person … (other than a passenger carried by reason of or in pursuance of a contract of employment), whilst the passenser is being carried in or upon or entering or getting to or alighting from the motorvehicle at the time of the occurrence of the event …* Yang membawa maksud bahawa terma pengecualian ini *terpakai hanya kepada situasi* apabila pihak yang tercedera *sedang berada di 'atas kenderaan'* yang dilindungi pada masa kejadian, dan bukan kepada fakta kes ini di mana *Perayu 'sudah turun' dan berada di belakang kenderaan pada masa kejadian.*

4. Hakim Mahkamah Tinggi gagal mengendahkan interpretasi yang betul kepada *Exception to Section II* dalam Polisi Responden yang berbunyi ' *The*

Pool shall not be liable in respect of … (iii) Death or bodily injury to any person... (other than a passenser carried by reason of or in pursuance of a contract of employment) … yang mana telah diputuskan oleh Mahkamah Agung dan Mahkamah Rayuan dalam kes-kes *United Oriental Assurance*, *Union Insurance,* dan *Peoples Insurance (supra)* sebagai suatu terma pengecualian yang *tidak terpakai atas pekerja yang sedang menumpang atas urusan kerja pada masa kejadian.*

5. Hakim Mahkamah Tinggi gagal memberi efek yang sepatutnya kepada perkataan '*other than a passenger carried by reason of or in pursuance of a contract of employment*' dalam terma pengecualian yang digunapakai oleh Responden, seperti yang diperuntukkan dalam Section 91(1)(bb) Akta Pengangkutan Jalanraya 1987 dan ditentukan oleh kes-kes Mahkamah Agung dan Mahkamah Rayuan.

6. Hakim Mahkamah Tinggi khilaf apabila membuat kesimpulan tersendiri bahawa Perayu adalah 'klindan' dalam kenderaan tersebut pada masa kejadian dan kes *Saw Poh Wah v Ooi Kean Hang* terpakai dalam kes ini, tanpa menyedari *'tiada penemuan fakta' atas tugas sebenar Perayu dengan majikan beliau* pada masa kejadian, dan *isu fakta ini ditikaikan* dan masih *belum dibuktikan dengan kukuh oleh Responden*, kerana pemilik kenderaan/majikan Perayu gagal ditemui oleh Penyeleras Responden.

7. Hakim Mahkamah Tinggi khilaf apabila gagal/enggan mengikuti ratio kes *Pacific & Orient Insurance Co Bhd v Thayamal a/p M Raman & Ors* [2014] 7 MLJ 18, yang telah mengikut ratio kes *Mahkamah Rayuan* Inggeris *Merchants' and Manufacturers, Insurance Co Ltd v Hunt and Others* [1941] 1 All ER 123, dimana telah diputuskan bahawa syarikat Insurance yang ingin memohon untuk suatu Deklarasi *tidak boleh berpegang kepada Penyataan Bertulis dari pihak berkepentingan sahaja*, tetapi perlu membuktikan pernyataan tersebut dengan kukuh.

8. Hakim Mahkamah Tinggi khilaf apabila gagal merujuk sama sekali kepada kes Mahkamah Rayuan *Lembaga Lebuhraya Malaysia v Cahaya Baru Development Bhd* [2009] 5 MLJ 14; [2010] 4 CLJ 419 dan *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 4 MLJ 541, yang telah memutuskan bahawa *Deklarasi yang remedi terakhir* yang harus diberikan hanya apabila tiada remedi lain kepada Pemohon, tetapi dalam kes ini *Responden masih berkebebasan menikaikan liability mereka di bawah Polisi yane dikeluarkan pada tahap recoveri*.

[15] We have read the appeal record and the able submissions of the counsel. After much consideration of the submission of the respondent, we take the view that the appeal must be allowed.

[16] What is important to note in this case is that the purported tortfeasor is the first defendant who is the authorised driver of the second defendant. Under

A the general law of negligence, the first defendant will be liable to the third defendant if he is found liable. The policy terms specifically states that it will indemnify the authorised driver. *That is to say, not only the policy covers the relationship between the second defendant and the insurer but over and above it extends the coverage also to an authorised driver*. However, RTA by itself does not
B prohibit the third defendant suing the first and second defendants under the common law. What RTA does is that it restricts the scope of insurer's liability in respect of the mandatory policy. *However, if the insurer wants to give extended cover such as to cover the negligence of the first defendant, there is no prohibition under the RTA*. This distinction must be kept in mind. Support for the
C proposition is found in books and case laws. To name a few are as follows:

(a) learned author S Santhana Dass in his book *The Law of Motor Insurance* (2010) *Marsden Law Book*, Kuala Lumpur, at p 107, observes:

> If a person is travelling in a motor vehicle driven by the insured, arising out of and in the course of his employment with the insured, the policy does not cover him if he is so injured or in case of his death.
>
> *However, if the motor vehicle was at all material times driven by the authorized driver and not the insured and the authorized driver is a party to the suit, then the insurer, by virtue of the authorized driver's clause in the policy will be liable as they have agreed under the policy to indemnify the authorized driver as though he was the insured and was separately covered under the terms of the policy.* As the passenger is not an employee of the authorized driver, the above 'employee' exception will not apply. (Emphasis added.)

(b) in *Halsbury's Laws of England* (3rd Ed) Vol 22, pp 361, observes:

> Even if a policy has an exclusion of liability for injuries sustained in the course of his employment by an employee of the assured, this exclusion is, so far as a permitted driver is concerned quite ineffective; if a driver and his passenger are fellow employees of the assured, the passenger is not the employee of the driver. The passenger can, therefore, obtain compensation from the insurance company if he is injured by the driver's negligence, notwithstanding the exclusion of injuries sustained by the employee of the assured, if there is a permitted driver clause and he sues the driver rather than his employer.

[17] It is now well established that the terms of the insurance policy under consideration has at least two contract of insurance as explained in books and case laws. To put it in simple terms, one contract is to cover the mandatory coverage requirement under the RTA and the other contract to cover the common law liability to some extent. To name a few are as follows:

(a) in the case of *Manap bin Mat v General Accident Fire & Life Assurance Corporation Ltd* [1971] 1 MLJ 134 it is stated as follows:

> In the insurance policy under consideration there was not one contract of insurance only as there was one contract with the policy holder and another

with such person driving on the policy holder's order or with his permission.

(b) in *Lim Eng Yew v United Oriental Assurance Sdn Bhd* [1989] 1 MLJ 454 at p 456; [1989] 2 CLJ Rep 65 at p 67, it was stated:

> It will be seen from the above provisions in the policy that under para 2 of Section II — liability to third party — an authorised driver would be indemnified by the insurers as though he was the insured. This means that Lim Swee Keong the authorized driver in this case was separately covered under the terms of the policy — and the plaintiff was certainly not a person in the employment of Lim Swee Keong as envisaged under exception (ii) in the exceptions to s II.

(c) *S Santhana Dass* at p 109 says:

> It is clear therefore that when a passenger is injured or dies as a result of an accident involving the motor vehicle, whilst he was travelling in the course of his employment with the insured, the insurer will still be liable under the policy if the motor vehicle was driven by the authorised driver and the plaintiff or his dependants had brought in the driver as a party to the proceedings. This is because the courts have held that there is a separate cover under the policy in respect of the authorised driver and as the injured is not the employee of the authorised driver, the exception relating to employees of the insured will not apply under the separate cover.

[18] It must also be noted that RTA to some extent is a social legislation attempting to provide some statutory protection to road victims. It does not prohibit greater coverage for road victims under the insurance policy terms. The learned trial judge in our view fell into grave error of law when she construed s 91(1)(aa) in a manner to favour the plaintiff when the plaintiff's policy term covers negligence of the first defendant which has nothing to do with the statutory mandatory coverage.

[19] The learned trial judge had relied on the case of *Saw Poh Wah v Ooi Kean Hang & Anor (Asia Insurance Co Ltd as third party)* [1985] 2 MLJ 387, where the editorial note says that there was an appeal to the Federal Court and the appeal was allowed. There was no written grounds by the Federal Court. In addition, *Saw Poh Wah*'s case relates to a consent judgment and an application to enforce a consent order against the insurers. The facts of the case and the decision of the High Court as per the law report reads as follows:

> The plaintiff claimed against the defendants for damages for personal injuries and consequential losses suffered by him due to the negligence of the first defendant as the servant or agent of the second defendant in driving a motor-lorry. The plaintiff was at all material times employed by the second defendant, the registered owner of the vehicle, as an attendant. The first defendant was employed by the same as driver. By consent the plaintiff obtained judgment against the defendants for the sum of $65,000/- in damages together with interest and costs to be taxed. The defendants

filed a claim against the Third Party, the insurers of the lorry, for whatever damages and costs which the defendants may be called upon to pay the plaintiff.

The said motor lorry had a 'C' Carrier licence and was insured with Third Party Risks. Section II of the insurance policy dealt with 'Liability to Third Parties'. The issue before the court depended on the true construction of Section II and the exceptions (ii) and (iii) of the policy.

Held:

(1) the liability of the driver, the first defendant, to the injured employee, the plaintiff, was covered by the insurance policy by virtue of Section II paragraph 2;

(2) the third party should therefore indemnify the defendants on the judgment entered for the plaintiff and pay the costs of third party proceeding to the defendants.

The editorial note reads as follows:

The third party appealed against the above decision to the Federal Court, vide FCCA No 32 of 1982. The appeal was heard before Abdul Hamid CJ (Malaya), Wan Suleiman and Abdoolcader FJJ on November 21, 1984. Counsel for the appellant were Messrs Khoo Eng Chin and Ong See Seng, while Mr Lim Ewe Hock appeared for the respondents. The Federal Court allowed the appeal of the insurer, without delivering a written judgment which undoubtedly would be of great interest to the legal profession and insurance companies. The Federal Court held that there was no cross-appeal by the respondents against the trial judge's finding that the plaintiff (the lorry attendant) was not a passenger. As such the learned trial judge should have held that the exceptions to Section II of the Policy applied. Hence, the insurer was not liable to indemnify the defendants.

[20] In our view, the learned trial judge ought not have given consideration to a decision of the Federal Court where no grounds have been given. It was only mentioned in the editorial note. No reasonable tribunal properly appraised with the case of *Saw Poh Wah* will be in a position to say on what grounds the appeal was allowed by the Federal Court taking into consideration the facts of the case and court proceedings are not similar to the instant case and that case had to do with consent order and subsequent enforcement as opposed to this case seeking a declaration. The difference is one of an apple and orange.

[21] For reasons stated above, we take the view that this is not a fit and proper case to allow the declaratory prayer. The appeal is allowed with costs of RM5,000 subject to allocatur. The order of the High Court is set aside. Deposit is to be refunded.

We hereby order so.

Appeal allowed with costs of RM5,000 subject to allocator; order of High Court set aside.

Reported by Dzulqarnain Ab Fatar